United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

349

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

CONSOLIDATED APPEAL
Nos. 21,703 AND 23,578

MAURICE MARSHALL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court
For the District of Columbia

BRIEF FOR APPELLANT

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Washington, D. C. 20036
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TABLE OF CITATIONS

4 Cases or authorities chiefly relied upon are marked by asterisks.

STATEMENT OF ISSUES PRESENTED

The issues presented to the Court for decision in Appeal No. 23,578 (now consolidated with Appeal No. 21,703) are:

(1) Whether The District Court Was In Error For Denying Marshall's Motion For A New Trial Based On Newly-Discovered Evidence; And

(2) Whether The District Court Should Have Considered The Issue Involving Marshall's Fifth Amendment Right To Due Process Raised By The Motion For New Trial.

This case has not been previously before this Court.

REFERENCES TO RULINGS

The basis of the order presented for review by this Court is found in the "MEMORANDUM-ORDER" dated September 18, 1969 of the District Court which comprises Section 39 (the number stamped in the lower right hand corner by the District Court) of the "Transcript of Pleadings" in Appeal No. 23,578.

STATEMENT OF THE CASE

This is an appeal from an Order of the United States District Court for the District of Columbia dated September 18, 1969, denying appellant's Motion for a new trial.

On December 6, 1967, Maurice Marshall was convicted of a six-count indictment charging him with armed robbery of the Riggs Bank located at the Watergate East complex, assault with a dangerous weapon and carrying a concealed weapon. Marshall was sentenced to 5 to 15 years on a robbery count, 3 to 10 years on the assault with a dangerous weapon count and 1 to 6 years on the carrying a concealed weapon count, all to run concurrently. Marshall is presently incarcerated and has served over two years of his sentence. The District Courts' decision was appealed on January 24, 1968, and the present Appeal was consolidated on November 14, 1969, by Order of this Court with his prior Appeal No. 21,703.

The transcript in Appeal No. 23,578 is divided into sections 28 through 35 (designated by a stamped number in the lower right-hand corner of the first page comprising each section), which sections comprise motions, affidavits, etc. Accordingly, for the purposes of this brief, the pages referred to will be designated:

Tr. D*, Section No., Page No. of paper in Section.

*This designation of "Tr. D" is for the purposes of consistency with the designation used in the main brief in Appeal No. 21,703.

Appellant's present attorney on appeal (his initial attorney on appeal withdrew upon entering government service) discovered certain new evidence in the form of notes taken by attorneys that were present at pre-trial lineups involving the appellant, Marshall.

After counsel for Marshall had been appointed by this Court to represent Marshall on appeal, he spoke with the previous attorney on appeal and was informed by him that Marshall was under the impression that no attorney had represented him at the police lineups which were held prior to Marshall's trial. Thereafter, counsel made inquiries at the Robbery Squad and the Identification Branch of the Metropolitan Police Department in an attempt to ascertain whether or not Marshall had benefit of counsel during the police lineups. Neither the files of the Robbery Squad, those of the Identification Branch, nor those files in the possessi of the Clerks of the District Court and of the Court of Appeals, re pectively, indicated that Marshall was represented by counsel at the lineups. Likewise, the trial transcript was silent in this regard.

However, Marshall's record in the Identification Branch did indicate that a Marie Klooz from the Neighborhood Legal Services was notified at 3 o'clock p.m. of Marshall's arrest. Counsel contacted Miss Klooz by telephone and she stated that she did not represent Marshall at the lineups, but that when she arrived at the lineups an attorney from the Legal Aid Agency was already present.

The Legal Aid Agency was contacted and they indicated that they had no record of this matter. Subsequently, counsel spoke with a person in the office of the U. S. Park Police, who informed him that a report in connection with the Marshall case listed Mr. Harvey Grossman and Mr. Kirby Howlett of the Legal Aid Agency as being present at the lineups. Counsel was informed by Legal Aid that Harvey Grossman was no longer with the Legal Aid Agency, but was able to contact Kirby S. Howlett who is still with the Agency. Conferences with Mr. Howlett revealed that Harvey Grossman, who had been staff attorney for Legal Aid Agency in July of 1967, actually attended the lineups on behalf of Marshall. Howlett had accompanied Grossman to the Robbery Squad for the lineups and had written down certain introductory notes with respect to Marshall, including his name and the date, in preparation for the lineups. These notes were turned over to Grossman, and he proceeded to record the events which occurred at the lineups.

Mr. Howlett was able to locate Grossman's notes in the Legal Aid Agency files and Grossman, personally, was located in Mexico by telephone in regard to these notes. Affidavits of Grossman and Howlett were prepared (Tr. D, Section 28) in which the events that took place at the lineups, as recorded in their notes (Tr. D, Section 28, designated "Exhibit A" attached to each Affidavit) are described.

As stated in the Grossman Affidavit (Tr. D, Section 28, page 1-4) he noted several defects which he observed and

deemed prejudicial and resulted in an unfair lineup. Over his objections, the Government ordered the lineups to proceed. Of particular significance are the facts that: (1) Marshall was presented in the lineups with much shorter men; (2) Marshall was presented with five other men who had moustaches while he had no moustache; (3) Only Marshall had on matching shirt and pants; and (4) Marshall had a waist much higher than at least five of the others in the lineup. Accordingly, as noted in the Grossman Affidavit, his physical appearance was not similar to the others in the lineups. The Grossman Affidavit also indicates that the officer conducting the lineups hesitated after asking Marshall to state the words "fill it up", but did so to the other subjects with no noticeable pause.

Finally, it is of extreme significance that the Grossman Affidavit indicates that after the second witness to the lineups chose Marshall from the line, when Marshall's position was second from the left in the line, Grossman moved Marshall to a different position. The next two witnesses picked the man who was at the second from the left position, which man bore little or no resemblance to Marshall and he was not thereafter identified.

It was attempted to bring the foregoing facts showing grossly discriminatory lineups to the attention of this Court in the brief on appeal in connection with Appeal No. 21,703. However, in an Order dated June 25, 1969, this Court granted a motion to strike this matter from appellant's brief, since the

lineup issue had not been previously before the District Court. However, in the final paragraph of the Order, this Court indicated that the Order was:

> "without prejudice to the filing by counsel for appellant in the District Court of any appropriate pleadings. See Smith v. Pollin 90 U.S. App. D. C. 178, 194 F.2d 349 (1952)."

The Smith case which was cited by this Court relates to a motion for a new trial brought before the District Court based on newly-discovered evidence while an appeal was pending. Thereafter, a Motion for New Trial was filed on July 22, 1969 before the District Court based on newly-discovered evidence.

In a Memorandum-Order filed September 18, 1969, (Tr. D, Sec. 32), the District Court denied Marshall's motion for a new trial on the ground that:

> ...defendant has not sustained his burden of demonstrating that he made dilligent efforts to procure this new evidence at trial. He has not explained, for example, why trial counsel could not have discovered the notes through the same procedure used by present counsel. (Tr. D, Section 32, pages 2-3)

The Order goes on to state (Tr. D, Sec. 32, page 3) that it appears that trial counsel had access to information concerning the lineup and that as part of its case the Defense presented two eye-witnesses who had viewed the lineup and established that each of them selected a man other than the Defendant. The District Court concluded that Defendant has not carried his burden on the dilligence issue and it is not necessary for the District Court to consider the merits of the "Stovall Issue" raised by his motion.

SUMMARY OF ARGUMENT

RELIEF SHOULD NOT DEPEND ON WHETHER MORE DILLIGENT OR FORTUNATE COUNSEL MIGHT POSSIBLY HAVE COME UPON EVIDENCE OF DISCRIMINATORY LINEUPS ON HIS OWN...THE SUPREME COURT HAS STATED THAT A CONFRONTATION CAN BE SO SUGGESTIVE AND CONDUCIVE TO IRREPARABLE MISTAKEN IDENTIFICATION AS TO BE A DENIAL OF DUE PROCESS OF LAW AS REQUIRED BY THE FIFTH AMENDMENT TO THE CONSTITUTION.

In regard to this Argument, the Court is requested to read Sections 28 and 32 of the Transcript of the pleadings in Appeal No. 23,578 comprising, inter alia, the Affidavits of Harvey Grossman and Kirby Howlett and the notes comprising Exhibit A attached to the Grossman Affidavit, and the District Court's Order.

ARGUMENT

The appellant, Maurice Marshall, was taken to police headquarters and placed in several lineups. As shown by the Grossman Affidavit and Exhibit A attached thereto comprising his notes taken at the lineups, the lineups were conducted in such a grossly discriminatory manner as to deny Marshall his Constitutional right to due process of law under the Fifth Amendment to the Constitution.

Ordinarily, the denial of a motion for a new trial is non-appealable. Luckenbach S. S. Co. v. U. S. 272, U. S. 533, 47 S.Ct. 186, 71 L.Ed. 394 (1926). As stated in the case of Hamilton v. United States, 81 App. D.C. 123, 140 F.2d 679, 682 (1944):

> The reason for that rule is that the Court may consider the evidence and the rulings of the trial on appeal from the judgment itself.

The Court indicated, however, that a motion for a new trial based on newly-discovered evidence is distinguishable stating:

> In such a case the newly discovered evidence does not appear on the record supporting the judgment, and the only possibility for review of the Court's ruling lies in an appeal from the denial of the motion for a new trial. Therefore, it is a settled rule of this Court that the refusal to grant a new trial on the ground of newly-discovered evidence may be ground for reversal where an abuse of discretion appears.

It is submitted that there was an abuse of discretion in the denial of the new trial motion in the present case by the District Court on the ground that Defendant had not carried his burden "on the dilligence issue."

In a case involving a motion for new trial on the ground of newly-discovered evidence in which Defendant's trial counsel had not uncovered the fact of a prior conviction of the complaining witness, the District Court in the case of United States v. Gordon, 246 F. Supp. 522, 525 (DC DC, 1965), aff'd 383 F.2d. 936 stated in connection with the question of "dilligence":

> I am of the opinion that the highest degree of dilligence would have acquired this procedure, but that is not the criterion. It is simply "dilligence", which I assume means ordinary dilligence. That is a relative term and depends upon the circumstances of the case...There is no suggestion that there was any deliberate effort to make a scanty investigation with a view to using something that might be found later as a basis for a new trial if conviction resulted. On the contrary, the attorney for Defendant acted in good faith throughout, although perhaps he was not as imaginative as others might have been under the same circumstances. However, I find that he was dilligent in the sense that I understand the term.

In its Order the District Court in the present case stated:

> Moreover, it appeared that trial counsel had access to information concerning the lineup. Indeed, as part of its case the Defense presented two eye-witnesses who had viewed the lineup, and established that each of them selected a man other than the Defendant.

While trial counsel may have had access to certain information concerning the lineup and presented two eye-witnesses who had viewed the lineup, there is nothing in the record which indicates that the information of which trial counsel "had access" were the notes made by Grossman which indicated that the lineups were conducted in a discriminatory manner. Furthermore, the fact that the two eye-witnesses referred to by the District Court in its' Order (Tr. D., Sec. 32, page 3), selected a man other than the Defendant, is consistent with the statements contained in the Grossman Affidavit which indicate that after Marshall was moved from the position in the line of second from the left, he was not thereafter identified by any witness as the robber. It is quite apparent from the record that had the only two witnesses out of the five witnesses who viewed the lineups selected someone other than Marshall, the Government would have been deprived of its "chief witnesses" as they were described by the prosecution in its closing arguments (pages 22-23 of "CLOSING ARGUMENTS" portion of the trial record dated December 6, 1967 in Appeal No. 21,703 Tr. C. pages 22-23).

After finding that Marshall had not carried his burden on the dilligence issue, the District Court stated in its' Order (Tr. D., Sec. 32, page 3):

> It is not necessary to consider the merits of the Stovall issue raised by his motion.

It is submitted that the District Court was in error in refusing to consider the Fifth Amendment Constitutional rights of the appellant Marshall based on this thin issue of dilligence. Certainly the "Stovall issue", which involves the question of whether the lineups in which Marshall was involved were so suggestive and conducive to irreparable mistaken identification as to be a denial of due process of law as required by the Fifth Amendment to the Constitution should not be ignored by the District Court on the ground that trial counsel could have been more dilligent. As stated by this Court in the case of Levin v. Katzenbach, ____ App. D.C.____, 363 F.2d. 287, 291 (1966):

> Ordinarily, a finding of lack of due dilligence will defeat a motion for a new trial, based only upon the significance of newly discovered evidence. But appellant's claim for release based upon a breach of the prosecutor's duty of disclosure challenges the fairness and therefore the validity, of the proceedings, and relief, either on a motion for a new trial or for habeas corpus, may not depend on whether more able, dilligent or fortunate counsel might possibly have come upon the evidence on his own. (Emphasis added).

Certainly, a strong analogy may be drawn between the effect on the "fairness" and the "validity" of the proceedings as tainted by the prosecutor's duty of disclosure in the Levin case, supra, and the effect on Marshall's right to a fair trial under the Constitution, as tainted by a discriminatory lineup.

In the case of Stovall v. Denno, 388 U.S. 293, S7 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967), the question was presented as to

whether the petitioner was entitled to relief on his claim that (pages 301-302):

> ...in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack independent of any right to counsel claim.

In this regard the Supreme Court went on to state:

> ...a claimed violation of due process of law in the conduct of a confrontation depends upon the totality of the circumstances surrounding it...

Thus, confrontations, such as the lineups in which Marshall was involved, may involve a denial of due process, if they are "unnecessarily suggestive and conducive to irreparable mistaken identification."

As stated by the Supreme Court in the case of United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967):

> Suggestion can be created intentionally or unintentionally in many subtle ways. (Page 229)

Referring to instances where the potential for substantial prejudice exists, the Court in Wade mentions (at page 232):

> "...tall suspects have been made to to stand with short-nonsuspects..."

Certainly, being much taller, without a moustache and dressed differently than the other subjects is a "grossly dissimilar appearance" as referred to in Wade. The prejudicial manner in which Marshall was presented at the lineups, e.g., with others who had no moustache, appeared to have had an effect on Miss Arroyo, a secretary at the bank, who picked Marshall

from the lineup after much hesitation, and testified (Transcript of Appeal 21,703 dated December 4 and 5, 1967, Tr. B at page 86):

> Q. Was there anything about him that you particularly remembered?
>
> A. I would say his build, his face, what struck me was that his face was smooth and I just recognized him. (Emphasis added).

As stated by the Court in Wade (at pages 228-229):

> A major factor contributing to the high incidence of miscarriage of justice from mistake identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor-perhaps it is responsible for more such error then all other factors combined."

The Court in Wade stated in remanding the case that the government should be given the chance to prove that the in-court identification was "based upon observation of the suspect other than the lineup identification." In other words the courtroom identification must have an independent origin and must not be tainted by the identification at a discriminatory lineup.

In the Wade [1/] case, supra, the Supreme Court not only established that a police lineup was a critical stage of the

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1/ Wade, like Stovall was decided about one month before the Marshall lineups.

investigation at which point the accused had a Sixth Amendment right to have legal counsel, but it also established guidelines for the government to follow in order to insure a fair and impartial line. Furthermore, it is clear that Wade requires that the accused not only have an attorney present, but that the attorney be permitted to effectively represent his client. Otherwise, the decision is meaningless. The government improperly proceeded with an illegal lineup over Grossman's objections thereby subjecting Marshall to the prejudicial lineup. It is noted that Grossman was not Marshall's trial attorney. Perhaps the Supreme Court's concern in this regard is reflected in the Wade case (footnote 27 on page 237) as follows:

> Although the right to counsel usually means a right to the suspect's own counsel, provision for substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's own counsel. (Emphasis added)

It is clear from Grossman's Affidavit, that the hazards were not eliminated from Marshall's lineup. Grossman's objections were ignored and the lineups were prejudicial and discriminatory.

Accordingly, even assuming arguendo that Marshall had not shown that his trial counsel had been dilligent in his attempts to discover the Grossman notes, it is submitted Marshall's right to due process of law should have been considered by the District Court and should not have been refused consideration on the "slim" question of dilligence.

CONCLUSION

For the foregoing reasons, appellant Marshall respectfully prays that this Court reverse the decision of the District Court denying Marshall's Motion for a New Trial.

Respectfully submitted,

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(Appointed by the Court of Appeals)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been mailed to attorney for appellee, Frank Q. Nebeker, Esquire, at the Office of the United States Attorney for the District of Columbia, United States Courthouse, Constitution Avenue and John Marshall Place, Washington, D. C. 20001.

David S. Abrams

David S. Abrams

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(1)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,703

MAURICE MARSHALL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court
For the District of Columbia

REPLY BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
21,703

MAURICE MARSHALL Appellant, v. UNITED STATES OF AMERICA Appellee.	)	Criminal No. 1175-67

REPLY BRIEF FOR APPELLANT

The case for Appellant has been fully presented in Appellant's main brief. However, the brief for Appellee has raised certain new issues and this brief in reply will be directed to a discussion of these new points.

A. Reply To Contention That Motion To Suppress Was Untimely

On pages 7 and 8 of the Appellee's brief, it is contended that Marshall's pro se motion to suppress the introduction of evidence which was seized pursuant to an arrest without probable cause was untimely and not properly raised below. It is further urged that the "failure of Appellant to file the motion pre-trial or to seek a hearing at the start of this case effectively deprived the Government of an opportunity to support the reasonableness of the arrest with a full record".

It is submitted that Appellee's contentions are not well taken for a number of reasons. Firstly, in contra-distinction to the situation in the case of United States v. Indiviglie, 352 F.2d 276 (2nd Cir. 1965) which is cited and relied upon by Appellee on page 8 of its brief, the trial court in the present case actually considered the motion to suppress and denied it (Tr. B 151-153).

The present appeal is based upon the record as developed in the District Court. If the record does not support the reasonableness of the arrest, then the decision of the District Court should be reversed.

The fact that Marshall's trial counsel may have "sat mute", as contended by Appellee, is of no moment. Appellant, himself, moved to suppress the evidence during the trial. Even had Marshall not made a motion to suppress the evidence, Rule 52(b) of the Rules of Criminal Procedure provides that plain errors affecting substantial rights may be noticed by the Court of Appeals. That such error may even be attacked after trial is evidenced by a recent Supreme Court decision which held that the issue of illegally seized evidence may be raised by petition for relief under 28 U.S.C. Section 2255, even though this issue was not raised at trial. Kaufman v. United States, 394 U.S. 217, 22 L.ed. 2d 227, 89 S. Ct 1068 (1969).

At any rate, the motion to suppress in the present case was made before the trial court and was considered by the trial court. Accordingly, it is submitted that the decision of the trial court is preperly before the Court of Appeals and the motion was not untimely.

B. Reply To Contention That Appellant's Arrest Was Reasonable And Based On Probable Cause

Somehow Appellee would have this Court believe that it was Appellant's burden at trial to show that the arrest was unreasonable, rather than Appellee's burden to show that the arrest was reasonable while stating (page 8):

> "Notwithstanding appellant's failure to create a complete record, . . ."

As stated on page 22 of Appellant's main brief on appeal, the prosecution has the burden of showing with considerable specificity, via the testimony of the police that a warrentless arrest was valid and that there was probable cause for arrest (citing cases therein).

The true weakness of Appellee's position in this appeal becomes readily apparent from the second paragraph on page 9 of Appellee's brief and the footnote 4 thereon which states:

> "As a result of whatever conversation may have taken place between Officer Sorah, the police dispatcher, the other police officers, and the employees of the bank, Officer Sorah proceeded to the parking lot. 4"

This footnote 4/ in the foregoing quotation states:

"4/ because of the hearsay requirement Officer Sorah did not testify as to whether a report from his dispatcher carried any description of the robber or as to the content of the message which caused him to respond directly to the bank. For the same reason the record does not report what conversations Officer Sorah had with the officers already at the bank or with the bank employees."

The record is completely silent as to:

(1) Any police dispatcher;

(2) Any conversations between Officer Sorah and a police dispatcher; and

(3) Any conversations between Officer Sorah and other police officers or employees of the bank.

The reason that Appellee has gone completely outside of the record is clear. Officer Sorah merely testified (Tr B 106-107) in response to a series of leading questions that he had "occasion to respond" to the area of the Watergate East on Virginia Avenue, or more particularly, in his own words:

> "I went to the parking lot in the rear of the Watergate."

Thereafter, he talked with Mr. Mansfield, a laborer picking up lumber (Tr B 98, 108). Mansfield didn't pay much attention to the individual who entered an automobile on the parking lot (Tr B 99) and didn't even know if the person he

first observed in the automobile was the same person found later (Tr B 105). As a result of a conversation with Mansfield, Officer Sorah went to the car that Marshall was in and arrested him.

Officer Sorah had no description of the person who had robbed the bank. In fact, the record does not show that Officer Sorah even knew that an offense of any kind had been committed, much less a bank robbery (See pages 19 to 20 of Appellant's main brief). Mr. Mansfield could not supply a link between Marshall and the robbery, since Mansfield did not even know that a robbery had taken place (Tr B 104). He merely saw a person get into a car and did not pay much attention to the person who got into the car (Tr B 99).

Thus, in order to furnish Officer Sorah with reason to believe that an offense had been committed and a reason to believe that Marshall had committed that offense, Appellee proposes the unsupported existence of:

(1) A report from the police dispatcher to Sorah carrying a description of the robber and the fact that the bank had been robbed, and

(2) Conversations between Sorah and persons who could identify the robber, e.g. the bank employees and/or officers already at the bank who had talked with witnesses to the robbery.

Since the aforesaid quoted portions of Appellee's brief are based upon mere conjecture and are not matters appearing in the record, they cannot be properly considered on this appeal.

Appellee cites the case of Washington v. United States, D. C. Cir. No. 22,022, decided February 28, 1969, (page 10 of Appellee's brief) for the proposition that it "also involved a case where the record was not fully developed on the probable cause point because the defendant had not seasonably raised the point at trial". Appellee contends that in the Washington case, the Court of Appeals exercised its discretion not to consider the issue of probable cause plain error, and thus, a remand is also unnecessary in the case at bar.

It is submitted that the Washington case is irrelevant to the case before this Court. In Washington the propriety of the arrest was unchallenged in the District Court, whereas in the present case the issue of probably cause was raised by motion and was ruled upon by the trial court. Thus, there is no issue of plain error in the case at bar as in Washington. Furthermore, in that case, the arresting officer was led to Washington's house by a boy caught fleeing from the robbery and that same boy identified Washington in

the presence of the arresting officer. Certainly these circumstances cannot be equated with those of the present case. At best, Mansfield merely told Officer Sorah that he had seen a man in a parked automobile. This is quite different from a witness leading a police officer to the defendant's house and identifying him.

Accordingly, it is submitted that the present case is one in which the issue of probable cause was raised at trial and considered by the trial court, thus obviating any consideration by this Court of any issue of "plain error". In addition, the record shows that the arrest was made without probable cause and, thus, the decision of the District Court should be reversed.

C. Reply To Contention That Trial Court Did Not Abuse Its Discretion By Not Excluding Photographs

Appellee contends that the photographs, which were shown to the jury, were used to "illustrate the testimony" of various witnesses and that the trial court admonished the jury that they were offered to show the scene of the testimony (Appellee's brief, page 11).

Government Exhibits 18-22 comprise photographs showing Marshall in custody with his hands behind his back (apparently handcuffed) and virtually surrounded by police

officers. It is Appellant's position that these photographs did more than "illustrate the testimony" of certain witnesses. For example, Officer Sorah testified that the photographs showed the ". . . custody of the defendant . . ." (Tr B 117). Furthermore, in contradistinction to Appellee's contention, it is submitted that the trial court's statement (Tr B 118):

> "Ladies and gentlemen, the exhibits you are now viewing are shown, are offered to show the scene surrounding the car of Mr. Layne concerning which there has been testimony."

could not have prevented the prejudicial and inflamatory impression made upon the jury upon viewing the defendant in custody with his hands behind his back in the presence of police officers.

In the case of Jackson v. United States, 129 U.S. App. D. C. 392, 395 F.2d 615 (1968) relied upon by appellee (page 11 of Appellee's brief), the photographs were excluded by the trial court since their introduction would have "served primarily" to inflame the jury, while the case of Covington v. United States, 125 U.S. App. D. C. 224 (1966) which is cited in the same paragraph of Appellee's brief, did not involve photographs. In that case the defendant's answers to cross-examination questions concerning prior offenses were held not to prejudice him in view of the strong case against him otherwise. In contradistinction thereto, Marshall did not voluntarily submit to the taking of such photographs.

In the case of Harried v. United States, 389 F.2d 281 (1967) which is cited on page 12 of Appellee's brief, the photographs were of the victum's body and were held admissible since they showed the mode of death, i.e., strangulation, and were not used solely to inflame the jury. In contradistinction thereto, the present photographs showing the defendant in custody with his hands behind his back mainly served to inflame the jury against Marshall, and essentially served no other purpose.

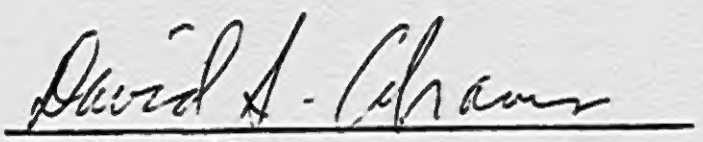
Finally, Appellee contends that since Appellant himself corroborated everything which the photographs may have shown, Appellant could not have been prejudiced by their admission. In support of this proposition, Appellee cites the case of Lomax v. United States, 125 U.S. App. D. C. 237, 370 F. 2d 483 (1966), (see page 12 of Appellee's brief). In Lomax, it was held that the admission of testimony of a police officer to the effect that the defendant was the owner of the auto allegedly used by the perpetrator of the offense involved was not error affecting the substantial rights of the defendant, since he admitted that he was in possession of that particular auto at the time in question.

In the case at bar, Appellant's testimony could not corroborate a picture showing him in police custody and the

effect upon the jury. It is one thing to testify in open court that you were arrested. It is quite another for the jury to see you in the custody of police officers with your hands behind your back after being placed under arrest. Such photographs are demeaning and could have served only to inflame the jury against Marshall. Accordingly, they should have been denied admission as being highly prejudicial and affecting substantial rights.

For the foregoing reasons and for those set forth in Appellant's main brief on appeal, it is respectfully submitted that the conviction of Appellant of the charges in the indictment should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief For Appellant has been mailed to attorney for Appellee, Frank Q. Nebeker, Esq., at the Office of the United States Attorney for the District of Columbia, United States Courthouse, Constitution Avenue and John Marshall Place, Washington, D. C. 20001, this 21st day of July, 1969.

David S. Abrams

David S. Abrams